



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Case no: **HC-MD-CIV-ACT-CON-2018/04675**

In the matter between:

GRAND TRADING CC

PLAINTIFF

and

ZHONG-MEI ENGINEERING (PTY) LTD

DEFENDANT

Neutral citation: *Grand Trading cc v Zhong-Mei Engineering (Pty) Ltd* (HC-MD-CIV-ACT-CON-2018/04675) [2020] NAHCMD 516 (12 November 2020)

Coram: Schimming-Chase AJ

Heard: 9 November, 10 November 2020

Delivered: **12 November 2020**

Flynote: **Civil Procedure** – Absolution from the instance – principles governing the application – when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what

would finally be required to be established – Whether the court has to consider the strength and quality of the plaintiff's evidence at this stage - Court concluded that in the instant case, although the evidence of the plaintiff was unreliable, it was not such that it amounted to a pool of contradictions or improbabilities, rendering the totality of the evidence inherently false for purposes of absolution from the instance.

Summary: Plaintiff instituted action against the defendant for payment of an amount of N\$6,204,008.09, due and payable in terms of a written consultancy agreement concluded between the parties. The conclusion of the consultancy agreement was common cause between the parties. At issue between the parties was whether the defendant was indebted to the plaintiff, the defendant's case being that the amount claimed was paid in full. It is apparent from the plaintiff's evidence that there were business dealings between the parties over a period of time, and with one entity other than the plaintiff. The plaintiff's evidence was that the amounts paid by the defendant were in respect of different agreements between the parties, and that the amounts due for the consultancy agreement remained outstanding.

Held - The plaintiff's evidence left much to be desired on the manner in which the defendant was invoiced, the contents of the invoices, the existence of some of the business arrangements between the parties, as well as the different entity utilised by the plaintiff for receipt of some payments made by the defendant. However, given the long-standing business dealings between plaintiff and defendant and the fact that payments were indeed made by the defendant as requested by the plaintiff, the plaintiff's evidence was not so farfetched or unreliable as to fall into being rejected at the absolution stage.

Held - The application for absolution from the instance was dismissed with costs.

ORDER

Application for absolution from the instance is dismissed with costs.

JUDGMENT

Schimming-Chase AJ

[1] The plaintiff is Grand Trading CC, a duly registered Namibian close corporation. The defendant is Zhong Mei Engineering (Pty) Ltd, a duly registered Namibian company with limited liability.

[2] On 2 November 2014 and at Windhoek, the plaintiff, represented by its main member Bernard Mumbashu, and the defendant, represented by Meng Aijun concluded a written consultancy agreement. In terms of this agreement, the plaintiff was required to “negotiate the tendering process to perfection, acquire, complete and submit the above mention (*sic*) project TENDER document as local partners on behalf of ZME¹.”

[3] The Tender in question related to the upgrading to bitumen standard of the district road from Oshakati to Ohangwena (Contract No RA/DC-CR/13-2013) valued at N\$216,800,289.87.

[4] For the consultancy services rendered by the plaintiff to the defendant, and in the event that the defendant was awarded the tender, the consultancy agreement provided that the defendant would remunerate the plaintiff the value of 3% of the tender, being N\$6,504,008.69 (excluding VAT).²

[5] The above facts are not in dispute between the parties. Also not in dispute, is the fact that the tender was awarded to the defendant, and that the defendant accordingly became obliged to pay to the plaintiff the amount of N\$6,504,008.69.³

¹ ZME was an acronym used in the agreement for the defendant.

² VAT was not added or claimed in the particulars of claim.

³ The amount claimed was reduced at the commencement of the hearing to N\$5,054,008.69 when the plaintiff confirmed that it had received payment of the amount of N\$1,450,000.00 from the defendant. N\$ 1,150,000 was paid on 28 October 2015. On 15 December 2015 the defendant made a further payment

[6] What is in dispute between the parties is whether the defendant is indebted to the plaintiff in the amount claimed, and in particular, whether the defendant paid the full amount owing to the plaintiff between 27 November 2014 and May 2016 by way of cash and payments to the personal bank account of Mr Mumbashu, and payments to a close corporation (of which Mr Mumbashu is also the main member), Jovevani Properties CC.

[7] In this regard, the plaintiff's Mr Mumbashu, the only witness for the plaintiff, testified that the amounts paid by the defendant were not in terms of the consultancy agreement, but rather for different tender related work undertaken by Jovevani Properties CC for the defendant. Mr Mumbashu further testified that various tax invoices were submitted to the defendant by Jovevani Properties CC for services rendered by Jovevani Properties CC to the defendant, and that the defendant paid Jovevani Properties CC for those services. Some payments were made directly into the bank account of Jovevani Properties CC, and some payments were made directly in cash to Mr Mumbashu, on his instructions.

[8] On 27 October 2015, an invoice was transmitted to the defendant by Jovevani Properties CC for payment of an amount of N\$1,150,000⁴ for "Grand Trading contractual agreement". On 28 October 2015, Mr Mumbashu on behalf of the plaintiff instructed the defendant to transfer the funds reflecting in the contract between the plaintiff and the defendant to the bank account of Jovevani Properties CC. The defendant paid this amount into the bank account of Jovevani Properties CC as requested.

[9] Mr Mumbashu testified that there were many dealings between Jovevani Properties CC and the defendant. Initially Jovevani Properties CC was appointed by the defendant as a consultant, and later Jovevani Properties CC became a local partner to the defendant. After the award of the tender for the Oshakati Ohangwena road to the defendant, the plaintiff continued its relationship with the defendant as a consultant, and

of N\$300,000.

⁴ This invoice included VAT.

Joevani Properties CC remained the local partner to with the defendant, and provided construction related services such as vehicles and labour.

[10] Mr Mumbashu further testified that as there were several dealings between Joevani Properties CC and the defendant, the payments made by the defendant to him directly were not only in respect of the consultancy agreement between the plaintiff and the defendant but also in respect of the dealings the defendant had with Joevani Properties CC. Furthermore, during 9 September 2014, a joint venture agreement was also concluded between the defendant and Joevani Properties CC in respect of the construction of Phase 2 of the head office of the Ministry of Fisheries and Marine Resources. In terms of this joint venture agreement, Joevani Properties CC was to receive 70% from the proceeds of such tender. A further oral consultancy agreement was also concluded between Joevani Properties CC and the defendant for the Swakopmund-Uis tender.

[11] Mr Mumbashu was cross examined at length about each of the various invoices submitted to the defendant under the Joevani Properties CC letterhead. He was also questioned about transfers made directly to him in cash, the main thrust of the cross examination being to show that the plaintiff had been paid in full, and that although the business relationship between the defendant and Joevani Properties CC was not disputed, the other business dealings with the defendant alleged to have existed by Mr Mumbashu, were non-existent. It was put to plaintiff that it was claiming much more than he was entitled to. This precipitated the absolution application before court.

[12] The well-established test applied in cases where absolution from the instance is sought was succinctly set out by the Supreme Court in *Stier and Another v Henke*.⁵

‘... (W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

⁵ 2012 (1) 370 SC at 373 D-I and the authorities approved there.

(*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T).

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ‘reasonable’ person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.”

[13] In *Factcrown Ltd v Namibia Broadcasting Corporation*,⁶ the Supreme Court expressed itself in the following terms:

‘This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution from the instance because without such evidence no court could find for the plaintiff.’

[14] In *Dannecker v Leopard Tours Car & Camping Hire CC*,⁷ the following considerations relevant to absolution at closing of the plaintiff’s case were stated:

‘Absolution at the end of plaintiff’s case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law.⁸

⁶ 2014 (2) NR 447 (SC) at para 72.

⁷ (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

⁸ Emphasis supplied.

- a) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;
- b) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;
- c) Where the plaintiff's evidence gives rise to more than one plausible inference, any of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;
- d) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.'

[15] As regards inconsistencies in the plaintiff's evidence, in *General Francois Olenga v Erwin Spranger*,⁹ Masuku J approved the following principle enunciated by the learned authors Herbstein *et al*:

'In deciding whether or not absolution should be granted, the court must assume that in the absence of very special circumstances, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established.¹⁰

[16] Similarly, Masuku J in *Soltec CC v Swakopmund Super Spar*,¹¹ held that it would be proper to jettison the evidence adduced by the plaintiff if 'the evidence led is poor, vacillating or of so romancing a character. . .' such that a court, properly directed, cannot place reliance on it. This speaks to a high degree of unreliability. It was also said

⁹ Unreported (I 3826/2011) [2016] NAHCMD 330 (28 October 2016).

¹⁰ At paragraph 26 (emphasis supplied).

¹¹ (I 160/2015 [2016] NAHCMD 159 (3 June 2016) at para 14.

that, 'The court should therefore avoid compelling a defendant at a great cost, to flog what is clearly a horse that has kicked the bucket at the end of the plaintiff's case, so to speak.'

[17] It was argued on behalf of the defendant, that the plaintiff's evidence was highly contradictory in many respects on simple factual issues, especially as regards what the monies paid were allocated for, and the various business relationships which the plaintiff apparently could not prove even existed. Much cross examination was also devoted to the vague descriptions of work undertaken in the various invoices, and the failure to claim VAT. In essence, so the argument goes, the plaintiff was unable, on any construction to prove his claim, because there were material contradictions on simple factual issues.

[18] I agree that there are aspects of the plaintiff's testimony that are unreliable, but the evidence, taken in totality as it relates to the claim before court and clear evidence of an extensive business relationship between the parties that has gone sour due to disputes over payment, is not inherently unreliable as to fall within the ambit of cases where the court will, on the basis of the manifest unreliability of the plaintiff's evidence, grant absolution.¹²

[19] My order is therefore as follows:

Application for absolution from the instance is refused with costs.

EM SCHIMMING-CHASE
ACTING JUDGE

¹² Klein v Kaura, unreported, (I 4315/2013) [2017] NAHCMD (15 January 2017) at para 95 and 101.

APPEARANCE:

PLAINTIFF:

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DEFENDANT:

C J van Vuuren
Krüger van Vurren & Co,
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